judicial inquiry to ascertain truth by the testimony of disinterested witnesses, and if any means can be devised by which disinterested witnesses can be obtained, ought it be denied validity and legality merely because the jurors would be inclined to accord to such witnesses the weight to which they, by reason of their disinterested character, are justly entitled? It can hardly be urged that the present situation of the jurors with regard to experts and expert testimony is to be preferred; a situation in which, after hearing expert witnesses of apparently equal credibility come to diametrically opposite conclusions upon the basis of the same state of facts, the jurors without any means of determining which of the witnesses are entitled to greater weight, naturally come to the conclusion that the side upon which the most experts testify must represent the truth of the issue. It would seem that any device for remedying, even in part, a procedure so fatal to the intelligent investigation and ascertainment of truth ought to be welcomed and sustained, rather than to be declared invalid. Moreover is the fact, that the court informs the jury that he has found the persons appointed to be disinterested, objectionable as indicating to the jury the opinion of the judge as to the issues? We submit that it is not. Manifestly for a judge to say to a jury, "This man is a disinterested witness," is far different from his saying, "this man is disinterested and knowing his testimony I think it is true." In the first situation, being the one contemplated by the statute, the court merely passes upon the witness's competency without expressing any opinion on his testimony, a thing which the court could not do in the nature of the case, for at that time the witness in question has not yet testified; while in the second situation the court expresses an opinion both as to the character of the witness and the truth and reasonableness of his testimony, a proceeding which could not arise under the statute in question. It would seem that the objection of the court based on the argument just discussed is without much foundation in reason.

In conclusion it may be said that it is to be regretted that the court in *People* v. *Dickerson,* supra, felt constrained to declare unconstitutional a statute of so useful and beneficial a character as the one involved in that case and to do so upon grounds, which upon examination would seem to be so unsubstantial and inconclusive, both upon reason and authority. It is to be hoped that the evils sought to be remedied by this statute will not long be suffered by the legislature to continue uncurbed, and that when any further legislation looking to their abolition comes before the court for construction, the court will not be impelled to go to so great lengths in declaring it invalid.

McK. R.

FEDERAL SUPREME COURT'S JURISDICTION UNALTERABLE.—In the recent decision of *Muskrat et al.* v. *United States,* 31 Sup. Ct. 250, the Federal Supreme Court shows its intention not to depart from the early established rule expounded in *Marbury* v. *Madison,* 1 Cranch 137. Congress by act of Mar. 1, 1907 (37 Stat. at L. 1015, Chap. 2285), attempted to confer jurisdiction upon the court of claims and by appeal upon the Federal Supreme Court, of certain suits by David Muskrat and others in behalf of certain of the Chero-

kee Indians, said suits to be brought for the purpose of determining the validity of acts of Congress passed since an act of July 1, 1902 (32 Stat. at L. 716, Chap. 1375), in so far as such act affected the rights of alienation, etc., and the number of persons entitled to the Cherokee lands. The court declared that it had no jurisdiction, because the act was not within the judicial power conferred by the Federal Constitution and because it would require of the Supreme Court action not judicial in its nature within the meaning of the Constitution.

Indirectly they thereby strengthen the argument of certain economists who contend that the court has come to be a drag on the development of the country. Yet they but reiterate and apply a doctrine which, with possibly the single exception of *United States* v. *Yale Todd* (note to case *U. S.* v. *Ferreira*), 13 How. 52, where a contrary view seems to have been taken, has always been the accepted law of the federal courts. *Marbury* v. *Madison,* 1 Cranch 137.

The specific application has to do with the question of "Advisory Opinions" or as called in England, "Consultative Opinions." It is a relation which like many others under the English system, has not become a part of our scheme of government. In England it has been the custom, growing out of the early position of the judges as assistants to the House of Lords, to obtain from them opinions on questions submitted. This custom can be traced in the records at least to the period of Richard II. 1 THAYER'S CONST. CAS. 175. But this act is regarded in England as clearly not an exercise of the judicial function; and the opinions are not considered as judicial decisions. *Head* v. *Head,* 1 Turn. & R. 138; *O'Connell's Case,* 11 Clark & Fin. 155. In that respect the English view is the same as the majority view in the United States. The idea is constitutional with them, and in Massachusetts, which gave the pattern to most of the United States which have adopted it, it is also, following the English system, constitutional. *Opinion of the Justices,* 126 Mass. 567.

When the United States Constitution was written nothing was said as to this subject. The government was divided into three branches with the judicial power vested in one supreme court and such inferior courts as Congress might ordain and establish (Art. III, Sec. 1), and its power was to extend over all cases in law and equity arising under the constitution, laws and treaties and to certain other expressed classes. (Art III., Sec. 2.) It does not extend to every violation of the Constitution which possibly may occur, but *only* "to a case in law or equity in which a right under such law is asserted in a court of justice." *Cohens* v. *Virginia,* 6 Wheat. 264. Or as said by Mr. Chief Justice MARSHALL in *Osborne* v. *Bank of the U. S.,* 9 Wheat. 738, 747, in speaking of the clause relating to the judiciary, "this clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States *when* any question respecting them shall assume such a form that the judicial power is capable of acting on it; that power is capable of acting *only* when the subject is submitted to it by a party who asserts his rights in the form prescribed by law."

Consequently when a matter is presented to the courts such as that in the *Muskrat* case, they find no jurisdiction under the judiciary power clause because: 1st, the subject is not contained in the jurisdiction there conferred and that jurisdiction as to judicial matters cannot under the decision in *Marbury* v. *Madison,* supra, be enlarged by any act of Congress. 2nd, the court under this clause is not given any jurisdiction or duty except of a judicial nature and the matter presented in the *Muskrat* case is not of that nature. The award of execution, the process of execution and the conclusiveness of the judgment are essential parts of every judgment passed by a court exercising judicial power. Note on *Gordon* v. *U. S.,* 117 U. S. 697. Nor could the fact that this case comes up from a lower court change the situation. For "although the inferior federal courts * * * are first created by law, they are nevertheless constitutional courts, *i. e.,* they are made by this article (Art III., Sec. 1), co-bearers of the judicial power of the United States." VON HOLST'S CONST. LAW OF U. S., Mason's ed., 98, note.

But a deeper and more powerful reason applies. As Story points out in his Commentaries on the Constitution, (2nd Ed. Ch. 7,) it was undeniably the view of the men who wrote the constitution, as shown by the views expressed in the Federalist and contemporary works and based as they were on the theories of Montesquieu and others of that school, that the three departments of the government should be entirely separate. The court is one of the three departments. It owes nothing to the legislature for its creation. Each has independent duties and fields. That of the court is essentially judicial. This clear-cut division is one of the most distinctive features of our constitution. In England this essentially separate existence is not found. "The courts cannot declare an act of Parliament void because in the opinion of the court it is inconsistent with the principles of Magna Charta or the Petition of Rights. Yet [even] in that country, the independence of the judiciary is invariably respected and upheld by the King and Parliament as well as by the courts; and the courts are never required to pass judgment in a suit where they cannot carry it into execution." Note to *Gordon* v. *U. S.,* 117 U. S. 697. Especially then, where the line between departments and the independence of each *is* clearly defined, and where the evident intention of the makers of the constitution was to have it so, should no duties except those of a judicial nature be placed upon the courts.

That the constitution was clearly drawn with a basis of division of duties, is nowhere better shown than in the fact that wherever it desired either department to assume in the least, any of the duties of another, it stated these encroachments expressly, as in Art. II., Sec. 2. Excluding these special cases the duties of the courts are expressly judicial and Congress may not impose any other duties which are not judicial in nature. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 38 L. Ed. 1047.

Clearly then when Congress either directly or indirectly asks for an opinion of the federal courts, it asks for that which the constitution does not provide; which its manner of construction does not warrant; which the spirit and theory of our government do not agree with. And on this, the court has always agreed. *Gordon* v. *United States,* 2 Wall. 561; note to 117 U. S.

697, by TANEY, C. J.; *Cohens* v. *Virginia,* 6 Wheat. 264; *La Abra Silver Mining Co.* v. *United States,* 175 U. S., 423, 44 L. Ed. 235; *District of Columbia* v. *Eslin, Admr.,* 183 U. S. 612, 46 L. Ed. 85; *In re Sanborn,* 148 U. S. 222, 37 L. Ed. 429; *United States* v. *Ferreira,* 54 U. S. (13 How.) 40-46, 14 L. Ed 40-42.

A majority of the state courts follow the rule of the federal courts. The only exceptions are: 1st, Those in which there is a constitutional provision imposing such duty upon the courts; 2nd, those in which it has been done by the courts on request, without any statute or other requirement. *Trevett* v. *Weeden,* (R. I.), THAYER'S LEGAL ESSAYS, p. 52; *Respublica* v. *de Longchamps,* I. Dall. III; Appendix, 3 Binney (Pa.) 598; *Power of the Governor,* 79 Ky. 621; *In re Board of Public Lands and Bldgs.,* 37 Neb. 425, 55 N. W. 1092.

The following states have constitutional provisions: Massachusetts (1780); New Hampshire (1784); Maine (1820); Rhode Island (1842); Florida (1868); Colorado (1886); South Dakota (1889). Missouri had such a provision from 1865 to 1875, and Oklahoma has recently provided one. A few statutory provisions have existed at various times, but have had very little bearing on the subject because of their restricted and limited character. Where required to give such opinions most of the state courts have held that they were not binding decisions. *Opinion of Westcott, J.,* 12 Fla. 664; *Taylor* v. *Place,* 4 R. I. 324; *Report of Judges,* 3 Bin. (Pa.) 595; Appendix, 95 Me. 556; *Opinion of Judges,* 55 Mo. 295; *State* v. *Johnson,* 21 Okla. 40, 96 Pac. 26; *Opinion of the Judges,* 25 Okla. 76, 105 Pac. 684. The English decisions are also in accord on this point; *Head* v. *Head,* 1 Turn. & R. 138.

Practically only one state gives to these opinions the force of a decision; *Matter of Senate Bill No. 65,* 12 Col. 466, 21 Pac. 478; and Appendix No. 1, 7 Greenl. (Me.), intimates that Maine may be on the same side. But see 7 Greenl. 491. Yet even in Colorado, a tendency to limit and restrict the application of the rule is seen. 12 Col. 466, supra; *In re Senate Bill No. 416,* 45 Col. 394, 101 Pac. 410. And also in those states having non-binding opinions, this same tendency to narrow the field is observed. *In re Executive Communication,* 23 Fla. 297, 6 South. 925; *Advisory Opinion to Governor,* 39 Fla. 397, 22 South. 681; *In re Advisory Opinion to Governor,* 50 Fla. 169, 39 South. 187; *In re Opinion of Justices,* — N. H. —, 75 Atl. 99; *In re Opinion of Judges,* 54 Fla. 136, 44 South. 756.

In general, then, it is apparent that the courts are following the rule as stated in the *Muskrat* case. Wherever there is found a different rule, it is because of special circumstances and even there the tendency to restrict the application is very evident. J.